

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: DEPARTMENT OF	)	DECISION OF DISAPPROVAL
MANAGED HEALTH CARE	)	OF REGULATORY ACTION
	)	
ACTION: Adopt section 1300.67.2.2	)	(Government Code section 11349.3)
of title 28 of the California Code of	)	
Regulations	)	OAL File No. 2008-0111-03 S
	)	

---

**BACKGROUND**

The Department of Managed Health Care (Department) proposed the adoption of section 1300.67.2.2 of title 28 to implement section 1367.03 of the Health and Safety Code by defining terms, adopting indicators of timely access, requiring each health care service plan to adopt standards for timely access to care, requiring plans to update their quality assurance programs to include self assessment, and by requiring plans to send reports of their results to the department. On January 11, 2008, the regulation was submitted to the Office of Administrative Law for review in accordance with the Administrative Procedure Act (APA) and on February 27, 2008, OAL disapproved the regulation. This Decision of Disapproval explains the reasons for OAL's action.

**DECISION**

OAL disapproved the proposed regulation because the Department failed to follow the procedure required under the APA and the notice of proposed regulatory action was inadequate.

**DISCUSSION**

At the heart of the APA there is a process designed to solicit public input on a proposal prior to its adoption as a new regulation. It begins with the publication of a notice that contains an informative digest with a summary of existing law and a description of the effect of the regulation. (Government Code section 11346.5 (a)(3)(A)). At the time of publication, an agency must also make the text of the proposed regulation and a statement of reasons available to the public to provide the rationale for the agency's action. (Government Code section 11346.2 (a), (b)). Armed with this information, a person interested in the matter may study the proposal and suggest improvements during the initial public comment period, which must be at least 45 days in length. After hearing public comments, an agency may agree with a suggestion for a modification and make a substantial change in the proposed text of the regulation. Before adopting the changed version of a regulation it must provide an additional period for public comment on the change of at least 15 days (Government Code section 11346.8 (c)).

This is the procedure followed by the Department in proposing the adoption of section 1300.67.2.2. In fact, the Department provided two periods of at least 15 days for public comment on changes from the original proposal to adopt the regulation. The last version offered up for public comment, and later submitted to OAL for review included extensive changes from the original proposal, the majority of them based upon public comments.

Clearly change is anticipated in rulemaking, but the APA places a limit on how much change there may be after a proposal has been open for 45 days of public comment. Government Code section 11346.8, subdivision (c) states that such changes must be “sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.” OAL has adopted a regulation to further explain the nature of *sufficiently related* changes. Title 1, California Code of Regulations, section 42, indicates that changes are sufficiently related “if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted.” This concept of what a person might reasonably expect serves to limit the likelihood that potential commenters will be caught unaware by a major change in the regulatory approach that could impair their opportunity to study the new proposal carefully and offer public comments concerning it.

OAL determined that the changes proposed by the Department in the text it offered for public comment from December 10 to December 26, 2007, and later submitted for OAL review and approval embody a regulatory approach markedly different from the original proposal described in the 45 day notice and original text. The Department is implementing Health and Safety Code section 1367.03 which directs it to develop indicators of timeliness of access to health care, standards for timeliness of access, and a procedure for annual reporting by health care service plans to the Department to describe their performance. The informative digest that was included in the notice described the Department’s action as follows:

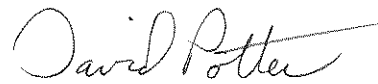
“AB 2179 (2002) added section 1367.03 of the Health and Safety Code, expressly instructing the Department to develop and adopt regulations to assure timely access to health care. The statute also contained specific requirements for the content of the regulations, including requirements that the regulations establish indicators of timeliness of access to care, *adopt standards for timely access to health care services*, and specify the manner in which health care service plans are to report annually to the Department on compliance with the standards. Accordingly, the regulation establishes standards and requirements related to: timely access to primary care physicians, specialty physicians, hospital care, and other health care; health plan monitoring of health care provider compliance with the standards; corrective action by health plans upon identifying deficiencies in compliance; and the statutory requirement of filing an annual report of compliance. *The statute requires the adoption of ‘time elapsed’ standards specifying the time elapsed between the time an enrollee seeks health care and obtains care.* The statute also authorizes the Department to adopt standards other than time elapsed but requires the Department to demonstrate why

such standard other than time elapsed is 'more appropriate.' *Proposed section 1300.67.2.2 adopts time elapsed standards* and proposes a 'same-day access' standard which is demonstrated to be 'more appropriate' than time elapsed standards because timeliness of access under the same-day access standard exceeds timeliness of access under all of the time elapsed standards of the proposed regulation." (Emphasis added.)

The original version of the regulation included 41 specific numerical standards limiting the time allowed a plan to provide an enrollee with a response, appointment or care. For example, the proposal would have required an appointment for urgent vision care to be offered within 48 hours from a request by an enrollee. The regulation that was finally adopted by the Department and submitted to OAL still includes indicators of timeliness, the requirement for a quality assurance program, and a procedure for reporting, but only one elapsed time standard [five minutes waiting time on the telephone]. The determination of elapsed time standards is central to this rulemaking, yet the final proposal shifts the task of setting timely access standards from the Department to the plans. Under the rule, the *plans would propose their own standards* limiting the time spent by enrollees waiting for an appointment for all indicators of timeliness. The plans would submit their standards and supporting information to the Department for review and approval. Of necessity, it seems, the standards finally determined would not be uniform from plan to plan, and the actual specification of time standards, along with any give and take incident to securing their approval would not be included in the public rulemaking process.

This major change from what was originally described in the notice and included in the original text took some commenters by surprise, as indicated by their objection to the procedure as well as the rule itself. OAL agrees that such changes would not have been expected by the public participating in this rulemaking action. A new rulemaking with a notice period of at least 45 days for public comment will be required to assure full and fair public participation.

Date: March 5, 2008



David Potter  
Senior Staff Counsel

For: Susan Lapsley  
Director

Original: Lucinda A. Ehnes, Director

Cc: Suzanne Chammout, Chief, Regulation Development Division